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No. 297

IN THE

Supreme Court of the United States

JAMES C. DAVIS, as Agent of the President of the United States under the Transportation Act of 1920, Petitioner,

vs.

R. L. CORNWELL, Respondent.

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

A.

STATEMENT OF THE CASE.

This case is brought to this Court under a Writ of Certiorari (p. 108) to review a judgment of the Supreme Court of the State of Montana (Tr. pp. 87 to 91) affirming a judgment of the District Court for Valley County, Montana (Tr. p. 7), entered upon a verdict of a jury (Tr. p. 6) awarding the plaintiff compensation for damages claimed to have been sustained in the loss of market prices for cattle, due to a two weeks alleged delay in October, 1918, by the Director General, in furnishing cattle cars at Glasgow, Montana, on the Great Northern Railway, for a shipment to Chicago.

The Complaint (Tr. pp. 1 to 5) shows that the action was based upon an express contract to furnish the cars on a given date and also on the ground that the defendant breached a common law duty to furnish

cars by the time fixed, the same being alleged to have been a reasonable time within which the cars should have been furnished.

Questions to Be Argued.

Of the various questions which arose on the appeal to the State Supreme Court (Tr. p. 85), whose decision (Tr. pp. 87-91) was adverse to the defendant, two remain to be determined in the present proceeding:

The first is (1) the conclusiveness of a car distribution made by the Director General as a Governmental Officer as distinguished from car distribution made by him as a Carrier.

The second is (2) the validity of a railway agent's alleged express contract to furnish cars in a car shortage as beyond his authority and working a discrimination.

These two questions are absolutely distinct. They will be separately presented by showing, as to each, in this statement of the case, how they arose and, in the brief of the argument, there will be separately presented a discussion of the law involved in these two questions.

I.

CONCLUSIVENESS OF CAR DISTRIBUTION MADE BY THE DIRECTOR GENERAL AS A GOVERNMENTAL OFFICER AS DISTINGUISHED FROM CAR DISTRIBUTION BY HIM AS A CARRIER.

On this matter of the car distribution made by the Director General, two bases of liability arose in the trial of the case. They were the following:

First: (1) Was the Director General, as a carrier in operating the railroad of the Great Northern Railway Company, through the Federal Manager of that railroad, negligent in the local distribution over the Great Northern system of the cars furnished for use on that system. In other words, was the Government as a carrier over the Great Northern negligent? This was a proper subject of inquiry and a proper basis of liability.

The second (2) question was whether the Director General, exercising Governmental functions and not his functions as a carrier, was negligent. It was shown (pp. 60-61, fol. 134 to 136) that, under Government operation, all railroad cars on the various railroads of the United States were pooled by the Government into a common reservoir as a car supply for filling car needs in the best way for the nation. The distribution of these cars was handled by the Director General and his regional directors who assigned to the Federal manager of each railroad the cars he might distribute over that railroad. In doing this work of regulating car supply, the Government or the Director General or the regional directors were not acting as carriers but as Government officers discharging Governmental functions. Therefore, the DEFENDANT, your petitioner, SUBMITTED THAT ONLY NEGLIGENCE, if any, IN THE DISTRIBUTION OF CARS BY THE FEDERAL MANAGER of some railroad (that is to say negligence BY THE GOVERNMENT AS A CARRIER by that railroad) WAS A PROPER SUBJECT OF INQUIRY, BUT THAT NEGLIGENCE, if any, IN THE DISTRIBUTION

OF CARS TO SUCH FEDERAL MANAGER (that is to say NEGLIGENCE, if any, BY THE GOVERNMENT or by the Director General or the regional directors acting NOT AS CARRIERS BUT as Governmental officers DISCHARGING GOVERNMENTAL FUNCTIONS) COULD NOT BE THE SUBJECT OF REVIEW BY A COURT OR JURY.

(a)

The Evidence on the Car Shortage.

(p. 60 to 61; fol. 134 to 136.)

The evidence showed that a serious car shortage existed all over the United States and, to relieve this shortage, and to handle the situation in the best way, cars previously owned by individual railway companies were not assigned by the Government, as the operator, to the owning lines, but were treated by the Director General as available for the Railroad Administration to be used on different railways over the United States, as conditions and the extraordinary exigencies of the time made proper. Pursuant to this policy the Director General divided the United States into various districts, placing over each a regional director, who should issue governmental instructions to the Federal manager of each railroad. Orders were, therefore, issued to the Federal manager of the Great Northern railroad by the Director General to allow cattle cars, received from the west over the Great Northern at St. Paul, to go through to Chicago instead of their being turned back at St. Paul and the connecting carrier being required to furnish cars for the movement from St. Paul to Chicago. Likewise the Director General determined the car distribution for each of these various districts, and the regional director, representing the Director Gen[illegible] in said district, in turn allotted these cars to [illegible]rrier in his territory, operated by the Governmen[illegible]. in the case of the Great Northen railroad, the cars allotted for

that railroad came under the jurisdiction of the Federal manager for that railroad (Tr. fol. 134).

The extent of the congestion and demand for cars may be shown by the fact that the evidence showed that, at the times in question, from September 23rd to October 16th, 1918, the receipts of cattle at Chicago for the months of September and October, 1918, were the largest for any previous month of any previous year on record, with records going back as far as 1865. Moreover, the growth in 1918 was shown. Thus, the receipts at Chicago for October, 1918, were 38.5 per cent over the receipts for the same month in 1916 and for September, 1918, when the plaintiff's order was said to have been placed, 67.9 per cent over the same month in 1916.

Moreover, the receipts of livestock for the year 1918 exceeded the receipts for any previous year on record and this was true, not only as to Chicago, but also at the seven other principal western terminal livestock markets.

Coming even to the exact time that the plaintiff alleges his special contract was made, the receipts of cattle at Chicago for the week ending September 28th were the largest on record for any previous week of any previous year and the week ending October 12, 1918, was the second largest in the history of the business.

These startling figures as to the pressure upon the Government in its operation of the railroads at that time, and a summary of the testimony presenting conflicts in evidence which were submitted to the jury are found in the transcript (p. 60, fol. 134, l. 18, to p. 61, fol. 136, l. 26).

The Director General and his regional directors exercised, in the matter of car distribution, governmental functions and the questions of negligence must begin, if at all, with the actions of the Federal man-

ager of any railroad who is the first carrier officer encountered.

(b)

How the Issue of Law Arose.

Evidence was introduced (Tr. pp. 60 to 61) making it a question of fact, in accordance with the above classification whether the Government as a carrier over the Great Northern (the Federal manager of the Great Northern and his subordinates) was negligent in the distribution of the cars assigned to that railroad; and evidence was also introduced making it a question of fact whether the Director General was negligent in not distributing enough cars to the Federal Manager of that railroad. ACCORDINGLY YOUR PETITIONER, AS DEFENDANT, SOUGHT TO HAVE THIS LATTER ISSUE WITHDRAWN FROM THE CASE AND REQUESTED THAT THE JURY BE INSTRUCTED (Tr. p. 71, ll. 12 to 21) THAT THEY COULD NOT FOUND A CAUSE OF ACTION FOR THE PLAINTIFF ON ANY EVIDENCE OF SUPPOSED NEGLIGENCE OF THE DIRECTOR GENERAL IN NOT DISTRIBUTING ENOUGH CARS TO THE GREAT NORTHERN, BUT A VERDICT FOR PLAINTIFF MUST BE BASED EXCLUSIVELY ON EVIDENCE OF NEGLIGENCE, IF ANY, IN THE DISTRIBUTION OF CARS ALLOTTED TO THE GREAT NORTHERN.

This issue of law between the parties was presented in the form of an instruction (Requested Instruction

No. 24) requested by the defendant to the effect that the jury could not review any car distribution made by the Director General, or by his regional representatives, but, in the matter of car distribution, the Director General as carrier could be found negligent only if the jury found that his representatives operating the Great Northern railway, were negligent in their distribution of the cars over that system which the Director General allotted to said Great Northern representatives or allowed them to use, but this instruction was refused, the Court being of the opinion that the Government, as a carrier, was a single carrier over the United States, not performing any governmental functions but acting only as a carrier, and, hence, subject to having all of its actions reviewed.

This requested instruction (which is set forth in Specification I in this brief) was refused, and the Supreme Court of the state upholds this refusal.

As under the Federal law the Government could be sued only as a carrier and as under the Federal law it and its officers were immune from suit based on the discharge of governmental functions, the Court, in allowing recovery based on alleged negligence in the discharge of governmental functions, has denied the defendant an immunity from suit based on the Federal law.

The only portion of the record which need be examined is small indeed. This, less than five pages, consists only of a portion of two pages setting out the above instruction (Tr. p. 71, ll. 12 to 21); two pages summarizing testimony (Tr. p. 60, l. 18, to p. 61, l. 26), and a few lines of the opinion of the State Appel-

late Court (p. 87, l. 1, to p. 88, l. 11; p. 89, ll. 40 to 47).

II.

VALIDITY OF AN AGENT'S ALLEGED EXPRESS CONTRACT TO FURNISH CARS IN A CAR SHORTAGE AS BEYOND HIS AUTHORITY AND WORKING A DISCRIMINATION.

Coming next to the contrary situation, not of car distribution generally by the Director General as a Government officer, but of local car distribution by the Government in a car shortage as a carrier over the Great Northern railway, the defendant requested an instruction (Defendant's Requested Instruction No. 20; Tr. p. 70, l. 45, to p. 71, l. 5, Specification II A) to the effect that a local station agent had no authority to enter into a contract with a shipper to furnish cars out of turn, but this instruction was refused and the Court gave its instructions No. 3 and 4 (Tr. p. 79; Specifications II B and II D) authorizing a recovery on a special contract for cars even though this would work a discrimination and defendant's objections to these instructions on these grounds were overruled. (Tr. p. 72; Specifications II C and II E.)

These instructions given and refused, and the objections made and overruled, are set out verbatim in this brief under the above numbered specifications.

Defendant thus raised its right under the Federal law to have the jury instructed as to the limits upon the authority of a station agent in this particular, and as to the illegality under the Federal law of any contract which would work a discrimination. By reason

of the refusal of this instruction and the giving of said other instructions defendant has been denied an immunity from suit under such a contract under the Federal law making such contracts void as working a discrimination.

B.

SPECIFICATION OF ERRORS.

I A

It was error to refuse to give Defendant's requested instruction No. 24, reading as follows (Tr. p. 71, ll. 12 to 21):

"No 24: You cannot review any car distribution made by the Director General himself or by his representatives determining general questions of distribution over the United States. In the matter of car distribution you can find the Director General negligent only if you find that his representatives operating the railway prior to Federal operation known as the Great Northern Railway were negligent in their distribution of cars which he allotted to them or allowed them to use."

II A

It was error to refuse to give Defendant's requested instruction No. 20, as follows (Tr. p. 70, l. 45, to p. 71, l. 5):

"No. 20: A Station Agent of the Director General has no authority to enter into an express contract to furnish cars on a date named by a shipper irrespective of the general service due the public, and his express agreement, if any, to furnish the cars on that date is not binding if that date is not a reasonable time."

II B

It was error to give the Court's instruction No. 3 (the same being also Plaintiff's requested instruction

No. 3), as follows (Tr. p. 79, l. 4 to l. 21; p. 72, ll. 3 to 20):

"To entitle the plaintiff to recover in this action, it is necessary for him to prove by preponderance of the evidence that he was the owner and in the possession of the cattle, or some of them, mentioned in his amended complaint, on or about the 23rd day of September, 1918; that the agent of the United States Railroad Administration promised to furnish the cars and motive power which it is admitted plaintiff ordered, or that the period between the 23rd day of September, 1918, and the second day of October, 1918, was a reasonable time within which the United States Railroad Administration should furnish said cars and motive power; and that plaintiff has been damaged in one or more of the respects set forth in his amended complaint, and if plaintiff has proven such facts by preponderance of the evidence your verdict should be in his favor in such sum as under these instructions and the evidence you determine he is entitled to recover, but not in any event in excess of $2995.00 and interest at the rate of eight per cent per annum from the date of the commencement of this action, to-wit, August 6th, 1920. Interest, however, is solely in the discretion of the jury."

II C

It was error to overrule defendant's objection to the Court's instruction, the same being also Plaintiff's requested instruction No. 3 (set forth in Specification II B), as follows (Tr. p. 72, ll. 3 to 20):

"The defendant objects to the plaintiff's instruction No. 3 on the ground that it makes the defendant liable for the agent's promise or agreement to furnish cars, even though there was no consideration for such promise, and even though the plaintiff did not expressly or impliedly contract to load the cars, in that the instruction states to the jury:—that the plaintiff is entitled to recover if he proved

the order by him and that the agent promised to furnish the cars, even though the time fixed was not a reasonable time.

"Defendant further objects on the ground that it makes the defendant liable for the alleged promise of the agent, even though the defendant could not in the discharge of its duties ever have furnished the cars, and makes the defendant liable for the promise of the agent, even though the promise of the agent would constitute a discrimination by the agent."

II D

It was error to give the Court's instruction No. 4 (the same being also Plaintiff's requested Instruction No. 4) as follows (Tr. p. 79, ll. 22 to 30; p. 72, ll. 24 to 36):

"No. 4: If you believe from the evidence in this case that the agent of the United States Railroad Administration at Glasgow, Montana, promised and agreed with plaintiff to furnish plaintiff a suitable number of cars for the transportation of plaintiff's cattle commencing on the 2nd day of October, 1918, it was the duty of the United States Railroad Administration so to do and it cannot escape liability on the ground that it did not have a sufficient number of suitable cars available to furnish the same to the plaintiff on said date."

II E

It was error to overrule defendant's objection to the Court's instruction No. 4, the same being also Plaintiff's requested instruction No. 4 (set forth in Specification No. II D) as follows (Tr. p. 72, ll. 24 to 36):

"Defendant objects to Plaintiff's proposed instruction No. 4 on the ground that it makes the defendant liable upon a mere promise or agreement of the agent, even if there was no consideration for such promise; in other words, if the agent promised to have cars and the plaintiff did not expressly, or

impliedly, promise to load the cars, the defendant would be liable, whereas; the defendant cannot be liable for the promise of the agent unless there is consideration therefor, and the defendant further objects to the instruction on the grounds stated to instruction No. 3."

C.

BRIEF OF ARGUMENT.

In this brief of the arguments on the law will be presented first (1) the argument on the conclusiveness of the car distribution by the Government. This will be divided into a discussion of (a) the principles applicable, (b) the Statutes, and (c) the decisions, and then (d) the view of the State Supreme Court will be analyzed. The second (2) subdivision of the argument will relate to the validity of the agent's alleged express contract to furnish cars.

I.

THE CONCLUSIVENESS OF THE CAR DISTRIBUTION BY THE GOVERNMENT.

The question here raised is simple and of first impression.

(a)

As a Matter of Principle.

The Government, in operating the railroads, was performing two functions. It was a Government regulating carriage and it was also a carrier. If the Government had only regulated the corporations, Government orders issued to the corporations as carriers would have been binding upon the corporations, and compliance by the carriers with the Government's war

orders would have been a complete defense. If, therefore, the Government, as a war measure, had directed all carrier corporations to pool their cars and to send them where the Government directed, an inability to fill a car order caused by a compliance with such a command, could not be the basis of a cause of action, and the courts could not require the carrier corporation to defend the action of the Government, or to show that the general car distribution effected by the Government was reasonable. What difference does it make, then, that, instead of the Government issuing directions to the corporation, it operates the railways itself and takes over the car supply and then distributes cars to each Government carrier?

A second reason is that the Government, as operator of the railways, did not consent to all liability, but only to liability in the performance of the work of a carrier. Here, too, it is a popular notion that the Government was a single carrier and, therefore, would be liable for all acts of the railroad administration from the Director General at Washington to the humblest employee. This is erroneous, however. The Government was not a carrier, but several carriers. The Government in operating the Great Northern was a carrier operating the Great Northern; in operating the Northern Pacific and the Milwaukee, it was not still the same carrier, but a second and third carrier. This will be shown in the discussion of the statutes and the decisions. Suffice it to say here that its liability, or operations, as carrier, began with its representatives operating a particular railroad. The Director General and the regional directors were not carrier

officers, but governmental officers. The first carrier officer is found in the Federal manager in charge of a particular railroad. As the Government was a carrier by the Great Northern, naturally its liability could be considered only from the standpoint of what the Federal manager of that railroad and his subordinates did in the matter of distributing cars allotted to him for that system. Neither the Court, nor the carrier (represented by the Federal manager of that railroad) could dispute the action of the regional directors, or of the Director General. As the carrier, via the Great Northern, was bound by the car distribution made to that system, such carrier could not be made liable on any theory that the car distribution was negligent, but only if, starting with the cars thus distributed to that railroad, the proof should show that the carrier was negligent in handling those cars.

Any other rule would defeat the very purpose of the Government in pooling the car supply, for a jury in Montana finds that the Government brought cars to Montana loading points too late, and a jury in each of the other states finds that the Government took cars from loading points in the other states for use in Montana too early.

Practically speaking, the recognition of plaintiff's rule would be impossible. It is just barely possible—almost not possible—for a single carrier to explain its own car supply, the demands made upon it, and the distribution it made of those cars. But, if it were necessary, in any case, to cover the entire car situation over the United States on all railroads, what attorney could present the evidence in any logical way,

what court could give the time adequately to hear it, what rules of evidence would necessarily have to be abolished in order to establish the facts?

Then, too, what has been accomplished? There might be a hundred such duplicate trials all over the United States, each reaching a different and inadequate decision on complicated facts, affirming or reversing, in effect, an exhaustive hearing held in the first instance by the Director General and his trained assistants, unhampered by rules of evidence necessarily inadequate for such an inquiry, and deciding from intimate knowledge and experience.

(b)

As a Matter of Statute.

These conclusions drawn from principle are confirmed by the Federal Control Law.

Sec. 3115-3/4 does not say that the President has taken over all railways and is operating them as a carrier, but says that the President has taken over the possession and operation of "certain systems of transportation" which are "called herein carriers." The Government thereafter thus became a "carrier" as to each "system of transportation." The Government was called "carriers" not "a carrier."

Sec. 3115-3/4j, then provides for the liability of the Government in the operation of the railways. It does not provide that the Government as carrier shall be liable for all its acts throughout the United States, in any way connected with a railway, but provides that "carriers" (the Government) while under Federal control shall be subject "to all laws and liabilities as com-

mon carriers." It provides how actions shall b brought "against such carriers" (the Government).

Missouri Pac. Ry. Co. vs. Ault, 256 U. S 554; 65 L. Ed. 1087; 41 Sup. Ct. R. 593.

Sec. 3115-3/41 provides for an accounting by suc Government carrier of the money collected by it and fo the maintenance of separate accounts by the Govern ment as carrier on one railroad and on another.

(c)

As a Matter of Decisions.

The decisions support this view and recognize tha the Government was not a single carrier, but severa carriers. The Government cannot be served on Northern Pacific cause of action so-called by servin a Great Northern Agent so-called and the distinctio between initial and connecting carriers is maintaine under Government operation, and employees of th Government as a carrier by the Northern Pacific ar not fellow servants of employees of the Governmer as carrier by the Great Northern.

Harmon vs. Hines, 101 S. E. 925;
Brooks vs. Director General, 263 Fed. 21
Bostwick vs. Director General, 189 N. W 907;
Payne vs. Lyon, 114 S. E. 892 at 896;
Farr vs. St. L. S. W. Ry. Co., 243 S. W. 80
Grandquist vs. Duluth M. & N. Ry. Co., 19 N. W. 126;
Davis vs. Daritzler Lbr. Co., 43 Sup. Ct. F 349; 67 L. Ed. ....., U. S. .....;
St. L. B. & M. Ry. Co. vs. McLean, 253 S W. 248.

It was not intended that Federal operation shoul

give a shipper greater rights than private operation. Under private operation, each carrier, in the matter of car service, was liable only for its own acts and was not liable for complying with Government regulations. So also the Government, as a carrier via the Great Northern, would be liable only for the acts of its representatives locally operating the Great Northern system.

On the exact question, the case of Underwood vs. Hines, 222 S. W. 1037, is as near in point as any case we can find.

(d)

The Views of the State Appellate Court.

We will show that the State Appellate Court apparently misunderstood the Federal question as involving a mere question of pleading. We will accordingly outline the views of the State Appellate Court and endeavor to show that the Court was in error in this regard.

(1)

The State Appellate Court Misunderstood the Federal Question as Involving a Question of Pleading.

Though the trial court passed on these questions adversely to the Government, and though this was presented to the Appellate Court for review, the Appellate Court sought to escape them by ruling that the pleadings were defective, a matter never before discussed. Thus the Appellate Court, in its opinion, says (Tr. p. 87, l. 32, to p. 88, l. 24; p. 89, ll. 40 to 47):

"The answer puts in issue most of the material

allegations of the complaint; however, it is admitted that on September 23, 1918, certain cars were ordered for Glasgow for October 2nd and that the cars were not furnished until October 16th. Defendant denies that he agreed to furnish the cars on October 2, or any other specified date and alleges that the cars were furnished within a reasonable time after they were ordered.

"At the time these cars were ordered and for more than a year thereafter the principal railways of this country, including the Great Northern Railway, were under the control of the United States in the exercise of its war powers. The management was lodged in the Director General, who acted through regional directors and through local officers and agents. The rolling stock theretofore belonging to the respective lines of railway was pooled and then apportioned among the several lines as the administration adjudged best suited to meet the exigencies of the times. During September and October, 1918, there was an extraordinary demand for equipment and a serious car shortage.

"It is the contention of the defendant that, under these circumstances, the local agent at Glasgow did not have authority to bind the railway administration by his promises to furnish to any one shipper a given number of cars at a designated time and place; that the apportionment of equipment to the different regions and through each region to the different lines within it was a matter of governmental regulation beyond review by the courts; that defendant could not be required to discriminate in favor of one shipper and against another, and that the ultimate duty which could be imposed upon him was to furnish to plaintiff his fair proportion of the cars available under the distribution made to the Great Northern line, and that liability could be predicated only upon a breach of that duty."

After having thus reviewed the evidence and the conflicting claims actually litigated in the trial Court,

the Appellate Court briefly disposed of the question as follows (Tr. p. 89, ll. 40 to 47):

> "The number of cars available to the Great Northern line was matter peculiarly within the knowledge of the defendant, his agents and subordinate officers in charge of that line, and assuming, without deciding, that defendant could be heard to say that the delay in furnishing the cars was occasioned by the war necessities of the Government, that was a matter of defense which was neither pleaded nor proved."

(2)

A Question of Pleadings Could Not Arise.

By a petition for a rehearing the defendant endeavored to show the Court that the new issue raised by the Appellate Court as to the sufficiency of the pleadings could not arise as, aside from the actual sufficiency of the pleadings, the evidence had been introduced without objection as relevant in the opinion of both parties, and the only question of law was not one of relevancy under pleadings, but of the legal effect of evidence actually introduced. The Supreme Court's decision itself fully outlines the fact of the car shortage and the issues actually litigated. As these issues were actually litigated (pleadings, insufficient pleadings, or no pleadings at all) under an unbroken line of Montana decisions, in harmony with universal law, it was too late to attempt any disposal of the matter as a question of pleading.

Lackman vs. Simpson, 129 Pac. 325, 46 Mont. 518, at 525;

State, ex. rel. Dansie vs. Nolan, 191 Pac. 150, 58 Mont. 167, at 171;

Ellinghouse vs. Ajax Livestock Co., 152 Pac. 481, 51 Mont. 275, at 282;
Moss vs. Goodhart, 131 Pac. 1071, 47 Mont. 257, at 267;
O'Brien vs. Corra Rock Island Mng. Co., 105 Pac. 724, 40 Mont. 212, at 222.

(3)

No Question of Pleadings Did Arise.

Moreover, the issue, in fact, was not an issue as to what should be pleaded as a defense, but a question as to what evidence could be the basis of plaintiff's alleged cause of action.

In response to the defendant's urging the error of the Court in refusing this instruction that the jury could not review car distribution made by the Government to the Great Northern, and that the plaintiff could not found a cause of action on that alleged negligent distribution, the Court replies merely, that the defendant cannot be heard to say that the delay was occasioned "by war necessities of the Government," because this was "a matter of defense which was neither pleaded nor proved."

But there was no issue of war necessities, referred to by the Court. The Court should take judicial notice of the fact that railroads were taken possession of by reason of war necessities, but we are not contending directly that this car distribution was a matter of war necessities, but that, as a matter of law, *whether because of war necessities or business necessities, or with or without reason, the Government did* as a matter of law *take possession of all cars,* and, as a govern-

mental function, distributed them to each railroad and then operated each railroad as a carrier. This is a matter of law of which the Court takes judicial notice without pleading, and we contend that the Court cannot review the reasonableness or lack of reasonableness of this law, or of the action of the Government as such, under this law. As well might the Court say, in a suit against the corporation, that it would not take judicial notice that the corporation was not liable, and that the corporation could not escape liability during Federal control, without pleading and proof that the Government took possession of the railroad and that there was a war necessity for the passage of the Federal Control Law. These things are matters of judicial knowledge, requiring no pleading, because they cannot be put in issue.

The proof shows, as stated, that the Government, as a Government, determined how many cars should be awarded to its representatives in operating the Great Northern as a carrier, and making a question of fact whether this was a negligent distribution or otherwise, and the proof also shows what was done by the Government, in its position as a carrier, in using those cars on the Great Northern. The latter, negligence by the Government as a carrier, or the use of the cars allotted to the Great Northern, was a proper basis of inquiry and could properly be the foundation of a cause of action. The former, a distribution of cars, not by the Government as a carrier, but by the Government as such, was not the subject of judicial inquiry and could not be the basis of a cause of action. The plaintiff on the other hand, meeting the proof as

to the number of cars available to the Government as a carrier over the Great Northern, stresses the number of cars available over the country, and therefore, available to the Director General, and seeks to found a cause of action on his alleged negligent failure to give the carrier sufficient cars. To meet this issue *the defendant tenders an instruction, not as a defense to the action, but as defining negligence and the basis of the plaintiff's cause of action, to the effect that the jury in determining, not what is a defense, but what is the proper basis for a cause of action may not review the distribution to the Great Northern, but as a matter of law, can review only the distribution made by the Great Northern. Yet the Court rules that it was not error to refuse this instruction, defining what could be a basis of the plaintiff's cause of action, because the defendant had not pleaded this as a defense.* Literally the plaintiff, as something on which he wanted to base his cause of action, stressed negligence on the part of the Government in not distributing sufficient cars to the Great Northern, and the objection is now made that, though this can be used in the trial Court favorably for a plaintiff as a basis for his cause of action and as a basis for arguing a verdict in his favor, and though the jury may have found a verdict for the plaintiff based solely on this alleged negligent distribution to the Great Northern, nevertheless, the defendant could not urge an error in an instruction given to this effect, or error in a refusal correctly to advise the jury as to the nature of the plaintiff's cause of action, *because these contentions, made by the plaintiff as the basis of his*

cause of action, were not pleaded by the defendant as a defense.

It is manifestly unfair to permit proof to go in without objection and, on its being used to show the number of cars over the United States and whether or not the Government was negligent in the distribution of cars to various regions and thence to various railroads, then, when the defendant seeks to have the effect of this evidence understood by the jury, to refuse an instruction advising the jury that they cannot base negligence on such a distribution, and thereby deprive the defendant of a legal right of exoneration and give the plaintiff a right to argue before the jury an issue of negligence, which as a matter of law, is denied to the plaintiff. It is manifestly unfair to a defendant to have this proof go in and to have the trial court permit the plaintiff to avail of it as a basis of his cause of action, and for the Appellate Court to say that this erroneous use of the proof by the plaintiff, and the Court's refusal to instruct the jury that the plaintiff could not found a cause of action upon it, do not constitute error, because the defendant did not plead it.

We respectfully submit, therefore, that this matter having been gone into by both parties without objection, no question of pleading could possibly arise and that *the Appellate Court has misconceived the true nature of the instruction as one not defining a defense which the Court says should have been pleaded, but as defining the limits of the plaintiff's cause of action, which, of course, would have no place in any pleading by the defendant.* And we again call attention to the Appellate Court's misconception in representing this

as a defense, of war necessities to be pleaded as a defense, where, as a matter of fact, *this matter arises not as a war necessity or as any necessity to be reviewed by any Court,* but it arises solely as a matter of law under the Federal Control Act, as to what facts can be taken into consideration by the plaintiff as a basis for his cause of action.

As the jury may have found in their general verdict that the Government as a carrier over the Great Northern, through the acts of the Federal manager of that railroad or his agents, was not negligent, but that the Government as a government through the director general or regional director, in distributing cars to the northwestern region, and in the northwestern region to the Great Northern, was negligent, the refusal to give the instruction in question was clearly prejudicial.

II.

THE ALLEGED CONTRACT TO FURNISH CARS AS A DISCRIMINATION.

The defendant contended that, since the days of preferences, free service, and discriminations on a railroad are over, it would be the duty of a carrier at all times, and especially in a time of car shortage, to treat all alike and to furnish cars without an undue preference of one shipper over another and, under private operation, even the president of the railroad, much less a station agent of the corporation in times of private operation, or of the Government under Government operation, would have no authority to give, and could not legally give, a shipper an advantage over others by a special contract to furnish cars. Each

shipper would have to await his turn and his just allotment of cars, and a station agent, or a superintendent of the division, or the president or Federal manager himself, would have no legal authority to nullify the law forbidding the granting of preferences or special service and to contract with a shipper that the shipper should receive his cars to the disadvantage of other shippers and as a discrimination against them, or as a special service to the shipper without any extra charge.

(a)

General Argument.

It will be conceded that, at least when a car shortage exists, so that there are not enough cars available to meet the demands made upon the carrier, it would be unlawful for the carrier to prefer one shipper over another and to give one shipper cars out of his turn or greater in number than he would be entitled to. It is the duty of the carrier, under these circumstances, to treat all alike and to apportion the shortage so that a fair distribution is made of the cars available to the carrier so that, during the season, each patron receives a fair allotment of cars. When there is a car shortage, a shipper is not entitled to all the cars he wants simply because his order is filed first; he is only entitled to his fair share of the available cars, in the light of the demands made.

If, in this situation, all shippers are being treated fairly by a dispatcher or a superintendent, but one shipper attempts to make a private contract with the president of the carrier, or, during Federal control,

with the Federal manager of a railroad, whereby the even distribution, effected by the superintendent or dispatcher, should be defeated, could it be held that this contract was valid? Or, if an even distribution had been ordered by the Federal manager, but a shipper secured a private contract from a superintendent or dispatcher, would it then be the duty of the manager to recognize a supposedly legal obligation of a contract which set at naught his careful arrangements for fair treatment to all, or would it not rather be the duty of the manager to direct the division officials to ignore the contract, illegally made, in defeating the public duties of the carrier?

If these are limitations on the power of the president of the corporation under private operation, or of superintendents and dispatchers and of federal managers under Government operation, how much more clearly does it appear that any station agent, at any of the various stations on the line of a railroad, has no power to enter into a contract for special car service, which will work a discrimination, or provide for a single shipper receiving any cars out of his turn, or in a greater number at one time than is just, bearing in mind the duty of the carrier to work no discrimination and to perform its public service of treating all alike.

Government operation suggests another point. The evidence reviewed shows that a serious car shortage existed all over the United States. The taking over of the railroads by the Government, as a matter of common knowledge, was partly inspired by a desire to relieve this situation. The Government supposedly

needed passenger cars for its troops, and freight cars for the sudden movement of war material. These increased demands for transportation and other reasons supposedly, at least, required the pooling of all cars and the adoption of a means whereby the balance of the cars for private enterprise should be properly distributed. For this purpose, as has been discussed, the Government, as such and not as carrier, promulgated certain governmental regulations for the carriers and, for this purpose, the Government, as carrier and not as a government, on various railroads, arranged for the even distribution of the cars proportioned to the needs of the community. *Can it be contended that either these governmental orders, or these plans as carriers adopted by the Government, can be set at naught by a single shipper stepping up to an agent and laughingly exclaiming that the shortage means nothing to him* and that the carefully worked out governmental orders, as to car supply and car distribution, and the local systematic arrangements by the Government as carrier, have not interfered with him; *he has a contract with the agent.*

These questions are their own answers. It must be the law that, without a tariff provision and a special charge for the extra right, a carrier cannot contract to furnish cars and thereby give a shipper special privileges and an insurance against risk of delays, which other shippers run; and, in times of a car shortage, it being conceded to be the duty of the carrier to treat all alike, a station agent, or the carrier itself, cannot have authority to contract to furnish cars where this would work a discrimination or defeat the carrier in

the discharge of its public duties, and, for this reason it was error in the Court to refuse defendant's Requested Instructions on this subject, and to give instructions to the contrary, overruling objections thereto as set forth in the above Specifications II a, b, c, d and e.

(b)

Statutes.

The following few sections of the Interstate Commerce Act, as set forth in the Compiled Statutes of 1918, are here cited:

Section 8563, subdivision (2),
Section 8565,
Section 8569, subdivision (1),
Section 8569, subdivision (7),
Section 8574, subdivision (4).

(c)

Authorities.

The following cases are directly in point:

Saitta & Jones vs. Penn. R. Co., 179 N. Y. S. 471;
Underwood vs. Hines, 222 S. W. 1037;
C. R. I. & P. Ry. Co. vs. Beatty, 42 Okla. 528; 141 Pac. 442 at 444.

The following cases should be cited by way of analogy:

C. & A. Ry. Co., vs. Kirby, 225 U. S. 155; 32 Sup. Ct. 648; 56 L. Ed. 1033.

As there is no more evil way of working preferences and discriminations contrary to the Federal law, than by recognizing such contracts as legal, the following authorities prohibiting discrimination in rates are in point by way of showing the reasons for the

policy of the nation in an analogous matter:

Pittsburg, etc. R. Co. vs. Fink, 250 U. S. 577; 40 Sup. Ct. R. 27; L. Ed. .....;
L. & N. R. Co. vs. Maxwell, 237 U. S. 94; 35 Sup. Ct. R. 494; 59 L. Ed. 853;
Tex. & Pac. Ry. Co. vs. Mugg, 202 U. S. 242; 26 Sup. Ct. R. 628; 50 L. Ed. 1011;
Tex. & Pac. Ry. Co. vs. Leatherwood, 250 U. S. 478; 39 Sup. Ct. R. 517; 63 L. Ed. 1096.

From the most recent case of Saitta & Jones vs. Penn. R. Co. (supra), the following is quoted:

"The plain reading of sections 1 (b), 3, 6 (a) and 6 (g) of the Interstate Commerce Act, 4 Fed. Stat. Ann. 351-421 (U. S. Comp. St. Secs. 8563, 8565, 8569), prohibits a common carrier from making any special contract relative to its cars as facilities of interstate shipment that is not specified in tariffs filed with the Commission. The defendant has not filed any tariff with the commission that provided for the contract made herein. The following authorities condemn the contract under consideration, and it cannot be the basis of a claim for damages: Chicago & Alton v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; Am. Smelting Co. v. Union Pac. (C. C. A.) 256 Fed. 737; Georgia, Fla. & Ala. Ry. Co. v. Blish, 241 U. S. 190, 36 Sup. Crt. 541, 60 L. Ed. 948; J. H. Hamline v. Ill. Cent. Ry. (D. C.) 212 Fed. 324; C. R. I. & P. Ry. v. Hardwick, 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203; South. Ry. Co. v. Reid, 222 U. S. 424, 32 Sup Ct. 140, 56 L. Ed. 257; Morrisdale Coal Co. v. Penna. Ry. Co., 230 U. S. 304, 33 Sup. Ct. 938, 57 L. Ed. 1494; Southern Ry. Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836."

From the case of C. R. I. & P. Ry. Co. vs. Beatty, supra, cited by respondent in the brief in opposition to the writ, is found the following:

"And in Instruction No. 8 the Court tells the Jury that, in the absence of a specific contract with the shipper, it is the duty of a common carrier to distribute the cars equally between shippers at points along its line. This instruction, in effect, tells the jury that the agent and a shipper could make a valid contract in direct conflict with the terms of the Interstate Commerce Act, and the amendments thereto, and thereby change the obligations imposed upon the carrier by these statutes. Such is not the law. The giving of this instruction was also prejudicial error. St. L. & S. F. R. Co. v. Bilby, 35 Okl. 589, 130 Pac. 1089.

"Under the acts of Congress regulating interstate shipments by common carriers, the shipper and the company are forbidden to enter into contracts whereby any particular person is given any special facility or advantage not open to all other shippers at that time and place. If the contracts in suit gave or attempted to give the plaintiff such privilege or advantage, they were void, and no action could be maintained on account of the breach thereof. Or if the company's failure to furnish the cars at the time its agent agreed with the shipper to furnish them was occasioned by the congested condition of freight traffic over its line at that time, then it incurred no liability for not furnishing the cars. Chicago & Alton R. R. Co. v. Kirby, supra; United States v. Union Stock Yards, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226; Clegg v. St. L. & S. F. R. Co., 203 Fed. 971, 122 C. C. A. 273; Elwood Grain Co. v. St. Joseph & G. I. Ry. Co., 202 Fed. 845, 121 C. C. A. 153; St. Louis, I. M. & S. Ry. Co. v. West Bros. (Tex. Civ. App.) 159 S. W. 142; A., T. & S. F. Ry. Co. v. Holmes, 18 Okl. 92, 90 Pac. 22; St. L. & S. F. R. Co. v. Bilby, 35 Okl. 589, 130 Pac. 1089. These issues were not clearly defined and submitted to the jury in the instructions as they should have been."

A careful reading of the case of O. R. & N. Ry. Co. v. Dumas, 181 Fed. 781, shows that it is really only a

strong dictum, based on fallacious reasoning, and the case was actually decided on a procedural matter with the Court very guardedly limiting its ruling to that precise record and reserving for later decision the exact question now in hand if it should be otherwise presented in some other case.

As regards other decisions which might seem to be to the contrary, it should be borne in mind that most of them (1) do not in fact pass upon the question here raised, unless, possibly, by way of dictum; they were decided (2) prior to the decisions of the Supreme Court of the United States above cited, which are controlling as to interstate shipments; and (3) they antedate and are not in accord with recent Federal Legislation regulating tariffs and charges and the practices of railroads.

Ancient dictum, even decisions, on the liability of carriers, must yield to the more modern realization of what necessarily follows from the concept of a carrier as engaged in the public service, so that its liabilities and expenses, under modern regulatory statutes, to say nothing of the Federal control statute, under which this action was brought, are now appreciated more and more to be public liabilities and public expenses.

Whatever may have been the rule as regards the authority or legal power of a station agent of the corporation, clearly as agent of the Government under Federal control he would not have the authority to enter into such a contract.

(d)

Analogous Cases and Illustrations of Discriminations.

As to whether an express contract for furnishing cars should be held to be prohibited by law unless supported by a special tariff, and as to whether in a time of a car shortage, such a contract should be held, by reason of its effect, to be unlawful as working a discrimination, the decisions in the Kirby and Fink cases, supra, show the policy of the nation and it is, therefore, helpful to compare the relationship between those cases and the present one.

(1) In the Kirby case, supra, for competitive reasons, the carrier contracted to move the Shipper's stock in time to make a particular connection so that it would make a particular market. The shipper might have given his shipment to another carrier and reached the market as expected. This contract was held void. In the instant case, there was no competition, but the Court rules that, by a mere private arrangement between one shipper and a railroad agent, in a car shortage, a promise to have cars on hand on a given day can upset all rules for equitable car distribution and give the shipper a preference over others, either in getting the cars or in compensation for not getting them. The only difference between the two cases is that, though both relate to delays, the Kirby case relates to delays after the shipment has moved and the instant case relates to delays before the shipment has moved. In the one case no action is recognized for negligently soliciting the business and the shipper's

loss is clear. In the present case an action for a failure to give notice of an inability to furnish the cars, if such failure of notice was negligent, would be all that the shipper could ask; indeed, if pleaded and proved, it is doubtful if such an action would lie. Moreover the shipper's damage from such want of notice is extremely limited.

(2) A merchant, ordering goods, is erroneously quoted a rate. The merchant, on receiving the goods, sells them on a narrow margin of profit based on the freight rate which he paid. He cannot, under the Fink case, supra, rely on an express contract for the rate named, nor can he sue for a negligent quotation of the rate. The merchant's damage and its cause is clear. In the instant case the shipper does not sue for even an alleged negligent failure to give him notice of an inability to furnish cars on a date named, in which the damages caused thereby would be small indeed, but he sues for the breach of a contract claiming a loss of market which he claims he had an absolute right to reach, over all other shippers, because of a special contract.

(3) In the two former cases, the free nature of the shipper's claim and the opportunity for collusion between the shipper and the carrier is sufficient to declare the contracts void. Here, too, there is even *a greater opportunity for collusion, for a favored shipper,* who without discrimination, could not reach a market in his regular turn, can insure himself by making an express contract for cars which will compel the carrier to give him the cars or pay him *for the loss of a market,* and this insurance he gets at public expense,

through the carrier, without additional charge and, in a car shortage, as a discrimination against others.

Indeed, to refuse to recognize the validity of such a contract works no hardship at all on the shipper. He does not lose a market because he was not entitled to a market if he could get to it only by an unfair discrimination. He is not necessarily put to additional expenses in holding his cattle, because he would be compelled to hold them anyway awaiting his turn. His only loss conceivable is perhaps some peculiar, limited, small, additional expense which does not peculiarly arise out of any failure to perform the contract but might, in a given case, arise out of a negligent failure to give him notice of the inability to furnish cars. If his right to a cause of action for a negligent failure to give him notice, if such a case shall arise, is recognized, the shipper is fully protected; if a greater right is recognized and if a contract to furnish cars is recognized, especially in a car shortage, he gets a special service for which no special charge is made in the tariffs and, in addition, in an allowance for a loss of market and other damages, the door is opened for the widest collusive fraud and discrimination between a thousand railroad agents and a few favored shippers which could be so carefully concealed that it could never be proved.

Aside from collusion, the recognition of a right to have a preference so created puts a premium on weak memory or false testimony, for the usual case is that there was, in fact, no express contract; the agent denies that he did any such extraordinary thing as to promise to have the cars on hand, but the shipper, disappointed in the sale of his cattle on a sensitive fluc-

tuating market, later vaguely recalls a "promise" by the agent; and it is argued that this vague oral thing can become a legal contract making the carrier assume the risk of all delays and displacing prior car orders of shippers who, declining to swear to a promise, rely only upon the common law obligation of the carrier. If a shipper, contrary to the testimony of the agent, or, as is more usual, even supported by the testimony of an agent, indeed over the written quotation of the agent, should claim a "promise" of a certain rate a few cents less than the tariff charges, both the agent and the shipper acting in good faith, this "promise" is void. Why should a mere disputed alleged oral promise, denied by the agent and worth many dollars to the shipper, who may not be acting in good faith, be held more legal merely because it involves cars and not rates?

Notice thus, in this case, that the supposed promise was oral (Tr. fol. 24). It was denied by the defendant (Tr. p. 51, fol. 114). Its claimed terms, as creating a separate contract with the plaintiff Cornwell for nine cars, was contrary to the written order showing a joint order by Stephens and Cornwell for 24 cars, signed by the shippers (Tr. fol. 113; fol. 47 to 50; p. 38, fol. 87 to 89; p. 45, fol. 102 to 104; p. 50, fol. 112 to 115), was contrary to the joint nature of the undertaking from the beginning in which Stephens and the plaintiff Cornwell jointly rounded up the cattle and jointly cared for and shipped them (Tr. p. 12, fol. 26 to fol. 33; p. 18, fol. 40, to p. 22, fol. 52; fol. 58; fol. 60 to 61; p. 28, fol. 65 to 68); was contrary to their express testimony characterizing the alleged two separate orders of nine cars by Cornwell and 11 cars by

Stephens as "that car proposition" (Tr. p. 19, fol. 43), and "that order of ours" (Tr. p. 37, ll. 31 to 32; fol. 85) was contrary to the later executed shipping contract signed by them showing a single shipment by Stephens and Cornwell of 20 cars (Tr. fol. 47 to 50; p. 46, fol. 103; p. 51, fol. 115; p. 38, fol. 87), and finally the alleged separate orders for nine cars by Cornwell and 11 cars by Stephens, though exactly totaling the number of cars actually loaded was inconsistent with the signed order for a total of 24, 33-ft. cars (Tr. fol. 136 to 137).

It is now argued that this supposed conflict (pp. 11 to 14; 18 to 27; pp. 27 to 31; 37 to 40; 41 to 42; 45 to 60; 63 to 64) between some of the shippers' oral testimony, on the one hand, and the writings signed at the time together with his own other oral testimony, can safely be allowed to work a discrimination not contrary to the policy of the much more appealing Kirby and Fink cases.

(e)

A Distinction to Be Noticed.

Let us bear in mind that this is not an action for damages claimed by reason of an alleged negligent failure of the agent to advise the plaintiff that the cars would not be on hand. No negligence in this particular was alleged, and the parties did not attempt to prove or disprove such an issue, and the Court expressly charged that it was not an issue. (Tr. pp. 80 to 81, fol. 178.)

If this were the cause of action alleged (if the basis of the cause of action was that, though the plaintiff,

by reason of the car shortage could not get cars on October 2nd or until October 16th, it was the duty of the agent to advise him to that effect so that he would not bring in his cattle and be to expense in holding them), then the plaintiff could not recover for any falling in the market, because, by supposition, he was not entitled to any market. The measure of damages would be merely the extra expense, if any, the shipper had been put to by reason of the failure to give him advice or any other damage caused by such failure.

But this is not the cause of action alleged here. Here the cause of action alleged is that, by reason of an express contract, the plaintiff had a legal right to sell his cattle on a certain day's market and this right existed in him, *notice or no notice*. If such a contract is valid when entered into, a notice by the agent that the carrier could not comply with it would be immaterial and would not prevent the plaintiff from recovering the loss of market whether or not notice was given.

(f)

Discussion of Contrary Arguments.

In arguments to the contrary it is sometimes stated that there is nothing illegal in such a contract because there is nothing in the world more innocent than the words used in an express contract to have cars at a particular station at a particular time. It is said that, on the face of the contract, the transaction is perfectly legal. The answer is that the law would have only a limited field of operation if it annulled only contracts which boldly and openly declared their illegal effect.

It is not the wording of the contract that makes it illegal, but its effect.

Similarly it may be said of the contract in the Kirby case, supra, that it is innocent enough, but the point is that thereby, in a guaranty that the connection will be made, the shipper, without an extra charge, is receiving free a special concession not mentioned in the tariffs. So also, by a railroad's express contract to furnish cars, thereby, in the guaranty that the cars will be on hand and that, therefore, the shipper will make a particular market, the shipper, without an extra charge, is receiving without extra charge a special concession beyond the general legal obligation resting on the carrier to furnish the cars within a reasonable time. If only the legal obligation exists, various causes excuse a delay; but, if the contract exists, then the carrier has guaranteed the presence of the cars and runs these risks of delay, and the ordinary excuses for a delay are not recognized. Such additional liability cannot be assumed unless the additional service is specified in the tariffs and a charge made therefor. Moreover, in a time of car shortage, there is the additional feature that the shipper is not only given this unauthorized service without charge, but he can get it only by way of a discrimination overriding the rights of others.

Again where, in a contract between the shipper and the carrier, a rate is misquoted, as in the Fink case, supra, the words are not less innocent, for the parties intend to quote the legal rate, but it is the legal effect of such a contract concerning rates which makes the contract illegal.

The fact, therefore, that the contract for cars does not expressly state that no extra charge is made for the service, or that the shipper is to be given cars out of turn, is not material and does not constitute it a valid agreement. The legal effect of the contract, if recognized, is that the carrier cannot perform it without discriminating against others, or, in the alternative of non-performance, in the recovery of damages, the shipper gets, in effect an unlawful market guaranty.

The other argument based on the supposed hardship on the shipper has already been covered. The hardship is, in fact, greater in other cases; in the present kind of case it rarely exists at all; such hardship as exists is not the loss of a market, for the shipper was not entitled to reach that market out of his turn; such limited hardship as may sometimes exist does not arise at all out of any contract, but out of a failure in some cases on the part of the shipper to make adequate preliminary inquiry through his riders before bringing his cattle in, or on the part of the railroad to give adequate information, an issue not involved in this case. Though a hardship is visited on a shipper, who, after being misquoted a rate by an agent acting in good faith, sells his product in reliance on that rate, no hardship at all is visited on the shipper by a rule merely declaring that a special contract for cars (glibly claimed by the shipper), at least in a car shortage, is void.

III.

MISCELLANEOUS.

Perhaps it should be added that, of course, the Fed-

eral Court is not bound (Atl. Coast Line Ry. Co. v. Burnette, 36 Sup. Ct. R. 75, 239 U. S. 199; Ward v. Love County, 253 U. S. 17, 64 L. Ed. 751; 40 Sup. Ct. R. 419) by the attempted procedural disposition of the first of the two Federal questions here presented.

Undoubtedly also we may assume that respondent's argument will not be further repeated that the record fails to show that the orders of the Director General in his Governmental capacity and the car shortage had anything to do with the plaintiff's delay in getting cars. Such an argument is in the very teeth of the express statement of the record (Tr. p. 60, l. 18, fol. 134, to p. 61, l. 26, fol. 136), and makes the action of counsel on both sides in requesting instructions, and the Court in ruling upon them and in seriously framing its instructions to meet actual issues, a mere inadvertent useless ceremony. Similarly the argument that the adverse general verdict of the jury, based upon a supposed conflict in the evidence, concludes defendant from arguing any errors in instructions in resolving that conflict will doubtless not be repeated here; this matter was fully covered (Tr. p. 93, l. 11, fol. 204, to p. 95, l. 20, fol. 209) in the petition for a rehearing.

Respectfully submitted,

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No. 297

IN THE

Supreme Court of the United States

JAMES C. DAVIS, as Agent of the President of the United States under the Transportation Act of 1920,

Petitioner,

vs.

R. L. CORNWELL,

Respondent.

BRIEF OF RESPONDENT

EDWIN L. NORRIS,
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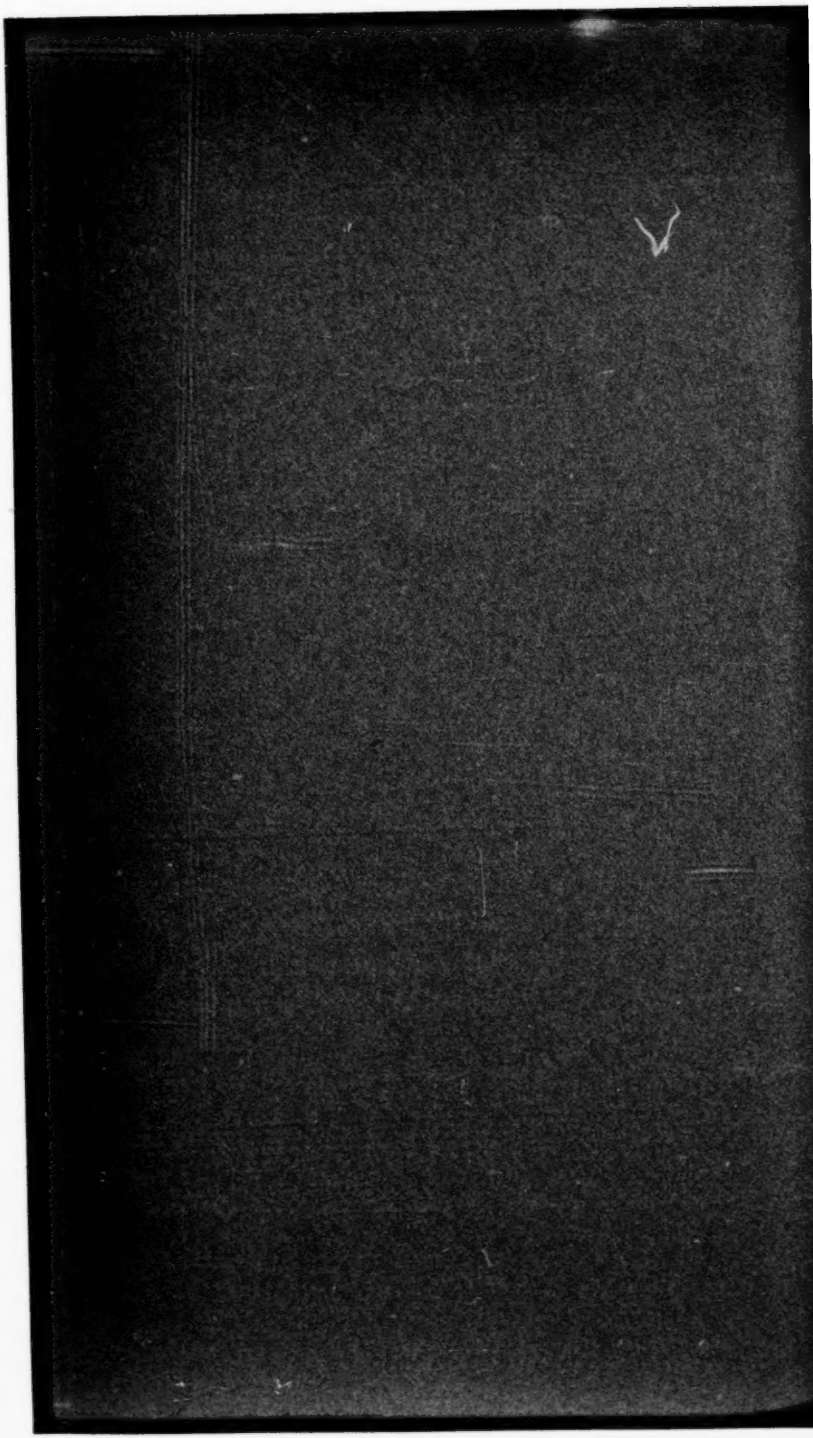
Great Falls, Montana,
Counsel for Respondent.

Filed _____, 1929

_____, Clerk.



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IN THE

Supreme Court of the United States

AMES C. DAVIS, as Agent of the President of the United States under the Transportation Act of 1920,

Petitioner,

vs.

. L. CORNWELL,

Respondent.

BRIEF OF RESPONDENT

A.

STATEMENT OF QUESTIONS INVOLVED.

This case comes to this Court upon certiorari to the upreme Court of Montana. By the petition for the rit and the specifications of error contained in Petioner's brief (Brief pp. 9 to 12) but two questions rise. Adopting the condensed paraphrase of the pecifications of error used by Petitioner and appearg upon page 2 of Petitioner's brief, such questions re:

1. The question relative to the conclusiveness of a r distribution made by the Director General as a overnmental Officer as distinguished from car disibution made by him as a Carrier.

2. The question relative to the validity of a railway agent's alleged express contract to furnish cars in a car shortage as beyond his authority and working a discrimination.

These questions are upon Petitioner's own statement the only ones involved herein and which may under the Petition for the Writ and the Specifications of Error, be passed upon by this Court.

B.

HOW THE QUESTIONS AROSE.

1. Conclusiveness of Car Distribution.

(a) The Pleadings.

The complaint (Tr. pp. 1 to 5; fol. 2 to 11) upon which action was tried discloses itself to be in ordinary form for recovery on a contract liability. Paragraph VI of the complaint (Tr. p. 2; fol. 4 and 5) alleges the ordering of the cars by Respondent for October 2, 1918, on September 23rd. Paragraph VII (Tr. p. 2; fol. 5) alleges that in compliance with such order the local agent of Petitioner agreed to have the cars ready by October 2nd. Paragraph VIII (Tr. pp. 2 and 3; fol. 5 and 6) alleges that the time elapsing between September 23rd and October 2nd was a reasonable time, and the further fact that Petitioner knew that Respondent relied upon the promise of the agent to furnish cars. Paragraph X (Tr. p. 3; fol. 7) alleges the failure to furnish cars until October 16th, which is the basis of alleged liability herein.

The answer of Petitioner (Tr. p. 5; fol. 11 and 12)

so far as it is applicable to the allegations of the complaint above set forth is as follows:

"II. Admits that on or about the 23rd day of September, 1918, certain cars were ordered for loading with cattle at Glasgow, Montana, on or about the 2nd day of October, 1918, but defendant denies that the agent of said United States Railroad Administration at said Glasgow promised or agreed on behalf of said Railroad Administration to furnish said cars for loading on October 2d, or any other date.

"III. Further answering defendant admits that said cars were not furnished on said 2nd day of October, 1918, and that said cars were not loaded and received by said Railroad Administration until about the 16th day of October, 1918, but alleges that said cars were furnished within a reasonable time after the order or request for same was placed."

It is obvious that under the pleadings, aside from the question of damage, but two issues material herein are presented, namely:

1. The making of the contract to furnish cars.

2. The issue as to whether the cars were furnished within a reasonable time.

Such issues present the first question stated by Petitioner: "Was the Government as a carrier over the Great Northern negligent?" (Brief p. 3.) As Petitioner states, "this was a proper subject of inquiry and a proper basis of liability." (Brief p. 3.) It is readily apparent that up to this point in the case the second matter presented by Petitioner had not arisen, "whether the Director General, exercising Governmental functions and not his functions as a carrier, was negligent." (Brief p. 3.) If at all, such issue must have arisen by reason of the admission of evi-

dence and the giving or refusing to give instructions thereon.

(b). The Evidence.

The evidence bearing upon this phase of the case is short and appears in the transcript in a condensed form. The words and form used are those of counsel for Petitioner herein. Since such evidence is not quoted but merely paraphrased in Petitioner's brief (pp. 4 and 5), and the importance thereof is obvious, we desire to quote so much of it as we deem pertinent upon the question of car distribution. This evidence appears on pages 60 and 61 of the Transcript (Fol. 134 to 137) and is as follows:

> "Thereupon the witnesses J. P. Sullivan, L. E. Gosselin, and A. E. Knights testified on behalf of the defendant to facts which made it a question of fact for the jury as to whether or not the defendant had exercised reasonable care in furnishing the cars ordered at Glasgow and claimed to be due to the plaintiff, or to the witness Stephens, and making it a question of fact for the pury as to whether or not there was not a great, unusual and extraordinary demand for cattle cars all over the United States in September and October, 1918, and the number of cars to be available for use on the railway of the Great Northern Railway Company was not determined by the representatives of the Director General operating said railway, or by the Federal Manager of said railway, but by the Regional Director of the United States Railroad Administration at Chicago, acting for the Director General in matters relating to car distribution and general railroad matters over the railways of the Great Northern Railway Company, the Northern Pacific Railway Company, the Chicago, Milwaukee & St. Paul Railway Company, the Chicago & Northwestern Railway Company, and other railways in the Northwest and that this said

extraordinary demand and the orders of said Regional Director regarding car distribution to the railway of said Great Northern Railway Company, made it impossible to furnish said cars at an earlier date than they were in fact furnished, the testimony of said witnesses not being conclusive, but making said issues questions of fact for the jury; the witnesses testifying in part that the receipts of cattle at Chicago for September and October, 1918, were the largest of any on record for any previous month of any previous year, and that the receipt of all livestock at Chicago for the year 1918, as well as at the seven other western terminal stock markets, showed that during that year they were the largest receipts according to any previous year on record, and that the receipts of cattle at Chicago for September, 1918, were 67.9 per cent over the receipts for the same month for 1916, and 17.4 per cent over 1917, and for October, 1918, 38.5 per cent for the same month in 1916, and 14.4 per cent for the same month in 1917, and the receipts of cattle at Chicago for the week ending September 28 were the largest on record for receipts for any previous week of any previous year, the records going as far back as 1865, and the week ending Oct. 12, 1918, was the second largest; and that under Government operation cars previously owned by any railroad company were not, for purposes of car distribution, treated as owned by said railway company or assigned to its lines, but same were treated by the Director General as available for the Railroad Administration, to be used on whatever railway over the United States he deemed it proper to distribute them, and that pursuant to this policy, Great Northern cattle cars loaded with cattle on points on the Great Northern Railway Company, which the Great Northern Railway Company had theretofore directed be turned back at So. St. Paul were during the period of Federal control directed to be run through to Chicago."

A casual reading of the above discloses that the only issue arising thereunder is whether "said extraordinary

demand and orders of said Regional Director regar ing car distribution to the railway of said Great Nort ern Railway Company, made it impossible to furni said cars at an earlier date.

By counsel's own wording of the evidence, whi was submitted in identical form to the State Supre Court, he advises us that no question of negligence the part of the Director General in allotting cars presented. The only question presented on this pha of the case is whether such allotment or failure to all had anything to do with the failure of the Gre Northern to furnish cars. In orther words, no ev dence was offered or admitted at the trial which cr ated an issue as to the negligence of the Director Ge eral as an allotting agent, but such evidence was a mitted as only created an issue as to whether the fa ure of the Great Northern to furnish cars was the resu of a failure to allot, a great demand, or somethi else.

We have not as yet reached the point then whe the matter found under the first subdivision of Pe tioner's brief may be said to be properly raised.

From the discussion of the evidence we must pa next to the instructions offered to complete our inve tigation.

(c) The instructions.

Petitioner bases his contentions so far as this pha of the case is concerned upon the refusal of the cou to give Petitioner's requested instruction No. 24 (T p. 71, ll. 12 to 21; Specification of Error IA, Bri p. 9) as follows:

"You cannot review any car distribution made by the Director General himself or by his representatives determining general questions of distribution over the United States. In the matter of car distribution you can find the Director General negligent only if you find that his representatives operating the railway prior to Federal operation known as the Great Northern Railway were negligent in their distribution of cars which he allotted to them or allowed them to use."

This instruction, providing it has sufficient foundation in the pleadings and evidence, and is correct in law, properly raises the first question set forth in Petitioner's brief and now before this Court.

This instruction was requested, as stated in Petitioner's brief, not as defining a defense, but as defining the limits of the plaintiff's cause of action. (Brief p. 23.) This statement made by counsel for Petitioner is extremely important, and will be again noticed later in this brief. This statement is palpably inconsistent with other statements in Petitioner's brief (pages 6 and 7).

(d) Opinion of State Supreme Court.

In passing upon the question here presented, Justice Holloway, speaking for the Supreme Court of Montana, said (Tr. p. 89, fol. 196):

"The number of cars available to the Great Northern line was a matter peculiarly within the knowledge of the defendant, his agents and subordinate officers in charge of that line, and assuming, without deciding, that defendant could be heard to say that the delay in furnishing the cars was occasioned by the war necessities of the government, that was a matter of defense which was neither pleaded nor proved."

We have placed before the Court, so far, every stage of the action upon which the question presented by Petitioner could arise. This has been done with a purpose of giving the court a view of the proceedings which otherwise it could not obtain.

2. Right of Local Agent to Contract.

The second question presented herein might properly be divided into two subdivisions—(1) The authority of the local agent; (2) The discriminatory nature of the contract. However, counsel for Petitioner has assumed that the first falls within the purview of the second, and has argued both matters out on a question of discrimination. We shall adopt the same method. Following the outline used in regard to the first question presented here—the question of distribution of cars—let us ascertain how the matters now under discussion arose.

(a) The Pleadings.

The only issues under the pleadings which have any bearing upon this phase of the case are whether or not a contract was actually made, and whether or not the period between September 23rd and October 2nd was a reasonable time. (Comp. Par. VI, VII, VIII, Tr. pp. 2 and 3; Ans. Par. II and III, Tr. p. 5.)

The giving of the order to the local agent is admitted.

(b) The Evidence.

So far as we can ascertain no evidence was offered or admitted upon the question of the authority of the local agent. The evidence does disclose, however, that

the local agent was in the habit of taking orders for cars and filling them. (Pltffs. Ex. 18, Tr. p. 60, fol. 133 and 134.)

Upon the question of the discriminatory nature of the contract the only evidence at all applicable is that heretofore quoted supra pp. 4 and 5 (Tr. pp. 60 and 61).

(c) The Instructions.

In Petitioner's specifications of error IIA to IIE, Brief, pages 9 to 12, we find error alleged in the refusal to give Petitioner's requested instruction No. 20 (Tr. pp. 70 and 71) and in the giving over Petitioner's objections of Court's Instruction No. 3 (Tr. pp. 72 and 79), and Court's Instruction No. 4 (Tr. pp. 72 and 79.)

As to such instructions suffice it to say at this time that if proper foundation was laid therefor in the pleadings and evidence, and if they state the law correctly, the question of discrimination and the agent's authority in the premises is properly raised.

(d) Opinion of the State Supreme Court.

Upon the question of the discriminatory nature of the contract, the Court said (Tr. p. 88, fol. 194):

> "It must be conceded that it was a primary purpose of the Commerce Act to prohibit unjust discrimination among shippers, and if the contract upon which plaintiff relies contemplated unusual service, advantage or preference to him not open until equal terms to other shippers, it was illegal and beyond the power of the agent at Glasgow to make; but there is not anything upon the face of a contract to furnish nine cars at Glasgow on October 2nd to suggest that plaintiff would receive more than his fair proportion of the cars available at the time, or that the service for which he contracted was not open to all others upon equal terms."

Upon the question of the authority of the local agent to contract the Court said (Tr. p. 89, fol. 195):

> "It could not be controverted that under private control the Great Northern Company's agent at Glasgow would have authority to make the contract in question and bind the company thereby, and it was the intention of the Congress, as indicated by section 10 of the Federal Control Act (40 Stat. 451), that each transportation system under federal control should continue liable substantially as it was under private control, any suit, however, to be brought against the Director General as the legal person responsible for the carrier's acts. It follows that the contract in question is valid and binding upon the defendant."

In such manner was the second matter now before this Court presented and passed upon by the Trial Court and the State Supreme Court.

C.

BRIEF OF ARGUMENT.

In the brief of argument upon the questions of law presented by Petitioner's specifications of error and brief we shall follow as closely as possible the outline used by counsel for Petitioner in their brief.

I.

THE CONCLUSIVENESS OF THE CAR DISTRIBUTION BY THE GOVERNMENT.

(a) As a matter of principle.

The matter urged under subdivisions (a), (b) and (c) have never been controverted in any respect by Respondent herein. The doctrine that the Government in taking over the several railroads of the United States acted as a separate carrier as to each railroad

is too well settled to require either the citation of statute or decision. Naturally, under such circumstances, the liability of the Government as a carrier arises by reason of the negligence of its representatives operating a particular road. We may also assume, without admitting, that in allotting cars to itself as a separate carrier, the Government, or its representatives, acted in a Governmental capacity, and that its actions in such respect may not be reviewed by a court or jury. This assumption is not, however, altogether borne out by the statutes under which the Government took control of the railroads.

The fallacy of Petitioner's argument that because it would be difficult to present evidence to a jury upon the question of car allotment, and that confusion would result by reason of conflicting decisions is readily apparent. Such argument begs the whole question. If car allotment was not a Governmental function then the authorities are one upon the proposition that evidence relating thereto would be inadmissible. Unavailability of cars except for certain reasons set forth in the Montana Code could not be used as a defense.

We are thrown back then upon the proposition that the car allotment was a Governmental function. It is from this premise that Petitioner must start his argument.

(b) As a matter of statute.

As heretofore stated, no controversy arises herein upon the proposition that the Government in operating the Great Northern was a separate carrier.

Upon the question of whether the Government in

allotting cars acted in its Governmental capacity, section 3115-3/4j, Comp. Stat. Suppl. 1919, is somewhat instructive. That section among other things provides:

> "Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

This quotation is simply made by way of illustration to show that it is by no means certain that Petitioner's contentions in this respect are correct.

It may be suggested also that the Federal Manager of the particular railroad, and the Regional Director, were agents merely of the Director General, and, in the last analysis, of the President. The Federal Manager does not, for the purpose of fixing liability, represent the carrier, nor does the Regional Director. Each is simply a subordinate of the Director General, who by statute is declared subject to liability, even though he is a governmental agency.

Again, no great distinction exists between the pooling described by the Director General and the pooling which would be permitted should the petitions of railroads now pending before the Interstate Commerce Commission be granted, e. g., the petition of the Great Northern, Northern Pacific and Burlington Railroads.

In the latter case certainly the defense here presented would not avail.

Since no reason exists, however, for arguing this matter, or disagreeing with Petitioner's contentions so far as concerns his premise, no further argument will be made in respect thereto.

(c) As a matter of decisions.

With the authorities cited under this subdivision of Petitioner's brief we have no fault to find. The point upon which they are cited is not in controversy herein.

Upon the principle heretofore set forth (subd. a), that unless car allotment was a Governmental question, unavailability of cars for such reason is no defense we cite:

Oregon R. & N. Co. vs. Dumas, 181 Fed. 781;
Harrison vs. Mo. Pac. Ry. Co., 74 Mo. 364;
Deming vs. Grand Trunk R. Co., 48 N. H. 455;
G. C. & S. F. Ry. Co. vs. Hume (Tex.), 27 S. W. 110;
Nichols vs. O. S. L. Ry. Co. (Utah), 66 Pac. 768;
Baxley vs. T. & M. R. Co. (Ala.), 29 So. 451;
Meriwether vs. Q. O. & K. C. Ry. Co. (Mo.), 107 S. W. 434;
St. L. I. M. & S. Ry. Co. vs. Tilby (Ark.), 174 S. W. 1167.

(d) The views of the State Appellate Court.

It is under this subdivision of Petitioner's Brief that we first meet argument and decisions upon the real questions involved. Up to this point no controversy upon questions of law or interpretation of statute or decision exists. Commencing here, however, the views

of Petitioner and Respondent must necessarily diverge.

(1) The State Appellate Court misunderstood the Federal question as involving a question of pleading.

The State Supreme Court tersely disposed of Petitioner's contentions upon this point as follows (Tr. p. 89):

> "The number of cars available to the Great Northern line was a matter peculiarly within the knowledge of the defendant, his agents and subordinate officers in charge of that line, and assuming, without deciding, that defendant could be heard to say that the delay in furnishing the cars was occasioned by the war necessities of the Government, that was a matter of defense which was neither pleaded nor proved."

As we shall see, this disposition of the matter was proper.

(2) As a question of Pleading.

Where evidence has been introduced without objection there can be no question but that for all purposes issues are deemed presented to the jury regardless of the state of the pleadings. As an abstract statement of the law obtaining in this jurisdiction, it is unquestionably correct and the authorities cited under this portion of the brief are decisive. However, if the evidence introduced does not raise the issue contended for, then no amendment is made, and a discussion of the pleadings and the issues made thereunder is proper. We shall see in the next subdivision of this brief no such issue as suggested by Petitioner was raised, and no such amendment, by implication or otherwise, was made.

(3) Question of Pleading continued.

The alleged error in this phase of the case arises upon the refusal of the Trial Court to give Petitioner's requested instruction No. 24 (Tr. p. 71, ll. 12 to 21). The purpose of such instruction, to use Petitioner's own language, was to prevent the jury from founding its verdict "on any evidence of supposed negligence of the Director General in not distributing enough cars to the Great Northern." (Brief, pp. 6 and 7.) It was offered, says Petitioner, not as a defense, "but as defining the limits of the plaintiff's cause of action." (Brief p. 23.)

It is elementary that there must be some basis for a requested instruction in the pleadings and in the evidence.

Bullard vs. Smith, 28 Mont. 387;
Yoder vs. Reynolds, 28 Mont. 183;
First Natl. Bank vs. Carroll, 35 Mont. 302;
Sullivan vs. Metropolitan Ins. Co., 35 Mont. 1;
Riley vs. Northern P. R. Co., 36 Mont. 545;
Miller's Estate, 37 Mont. 545;
Lindsay vs. Kroeger, 37 Mont. 231;
Marron vs. Great Northern R. Co., 46 Mont. 593.

The only possible theory for the instruction was to excuse, if possible, the delinquency of the carrier, assuming the contract to be non-discriminatory and valid.

Section 7452, Revised Codes of Montana, 1921, provides:

"The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

"1. When such performance or offer is prevent-

ed or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse;

"2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; or,

"3. When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time."

This section is exclusive by reason of Section 10703 of the Revised Codes of Montana 1921, which provides:

"In this state there is no common law in any case where the law is declared by the code or statute; but where not so declared, if the same is applicable and of a general nature, and not in conflict with the code or other statutes, the common law shall be the law and rule of decision."

Matters tending to excuse failure to perform or delay in performance must be specially pleaded,

McFarland vs. Welch, 48 Mont. 196,

and cannot be introduced in evidence under a mere denial.

13 C. J. 736;
Eucalyptus Growers Assn. vs Orange Co. N. & L. Co. (Cal.), 163 Pac. 45;
Lord vs. Miller (Wash.), 150 Pac. 631;
Morse vs. Tillotson & W. Co. (C. C. A.), 253 Fed. 340;
Lee Bros. & Greer vs. Glenn (S. C.), 99 S. E. 757.

In Oregon R. & N. Co. vs. Dumas, 181 Fed. 781, excuse was properly pleaded.

Some contention is made that no necessity arose for

pleading such matters in avoidance by reason of the fact that the court should take judicial notice of the fact of Federal control and war necessities. The fallacy of such a contention and its inapplicability to the present case is apparent.

Assuming that the Court took judicial notice of Federal control, war necessities and even of the fact that cars were pooled and allotted by the Government, it still could not take judicial notice of the fact that Petitioner intended to rely upon such facts for his defense unless they were pleaded.

> Arkansas vs. Kansas & T. C. Co., 183 U. S. 185, 22 S. Ct. 47, 46 L. Ed. 144;
> Edwards vs. American Ry. Ex. Co. (Mo.), 216 S. W. 781.

Under no circumstances could any court take judicial notice of the fact that insufficient cars were allotted to the Great Northern. Even Petitioner recognizes the force of this argument when he insists that the *evidence* introduced by him is sufficient to show such fact.

Under the authorities supra it is apparent that Petitioner's requested instruction No. 24 could not be based upon any issue raised by the pleadings, and unless the pleadings were amended by evidence admitted without objection the refusal to give the instruction was not error. Realizing the force of Respondent's contention in this respect Petitioner contends that the evidence admitted without objection (Tr. pp. 60 and 61) does amend the pleadings and so renders the instruction proper. With such contention Respondent disagrees.

Again we call the attention of this Court to the fact

that the matter appearing on pages 60 and 61 of the Transcript is in the language of counsel for Petitioner herein. Petitioner says that such evidence raises "a question of fact whether this was a negligent distribution or otherwise." But the language of the Transcript will bear no such interpretation. That evidence was introduced for the following purposes only:

1. To show that cattle cars were pooled and allotted by the Regional Director acting under the Director General.

2. To show a great and unusual demand for cattle cars.

3. To raise an issue of fact for the determination of the jury as to whether *"this said extraordinary demand and the orders of said Regional Director regarding car distribution to the railway of said Great Northern Railway Company, made it impossible to furnish said cars at an earlier date than they were in fact furnished."*

Under such evidence there could be no review of the orders of the Regional Director in allotting cars, because no order of his was in evidence. Had such matter been presented in defense surely a different method would have been adopted. Records showing what allotment was made and evidence showing impossibility of performance would have been introduced. But counsel for Petitioner admits that such evidence as was introduced was not offered or admitted for the purpose of defense. (Brief p. 23.)

Under the facts presented in the Trial Court no review of the order of allotment by the jury was neces-

sary or even possible. The only issue presented to them, using Petitioner's own language, was whether the delay in performance was or was not due to such allotment and an extraordinary demand.

By the verdict all issues of fact were resolved in favor of the plaintiff, Respondent herein.

Ellinghouse vs. Hansen Packing Co., 66 Mont. 444, 213 Pac. 1087.

As we have seen, the only possible theory upon which such evidence was admissible and the instruction proper was to show an excuse for delay in performance under section 7452, Revised Codes of Montana, 1921, supra.

Even assuming, therefore, that such evidence was sufficient to raise the issue, the jury by its verdict found against Petitioner thereon, and its finding is conclusive.

If the matter presented was a defense as urged by Petitioner the jury must have found that the delay was not occasioned by the failure to allot cars.

Ellinghouse vs. Hansen Packing Co., supra.

It is clear, therefore, that the evidence submitted by Petitioner did not amend the pleadings in the respect contended for, nor does such evidence raise the issue suggested by counsel for Petitioner. In either of such events the requested instruction was unnecessary and improper and no error was committed by the court's refusal.

It is equally clear that the Petitioner was not prejudiced by such refusal, for, assuming that the issue as

contended for was raised by the evidence, the jury found against Petitioner thereon by its verdict.

(4) As a matter of practice.

For other reasons equally cogent no error was committed in the refusal of this instruction.

It is the rule of law in Montana that no error is committed in the refusal of a requested instruction where its substance was amply covered in other instructions.

> Hunt vs. Van, 61 Mont. 395, 202 Pac. 573;
> McLean vs. Rice, 63 Mont. 556, 208 Pac. 252;
> Mitchell vs. Northern P. R. Co., 63 Mont. 500, 208 Pac. 903.

Court's instruction No. 16 (Tr. p. 81, fol. 179), Petitioner's requested instruction No. 23 (Tr. p. 71, l. 11) is as follows:

> "The defendant is not liable for damages, if any, to the animals not proximately caused by his, defendant Director General's own acts or neglects, if any, or those, if any, of his representatives. The only damages, if any, for which recovery may be had by the plaintiff, if your verdict is for the plaintiff, is such as you may find was proximately caused by some act or neglect of defendant."

This instruction which defines "the basis of the plaintiff's cause of action," was requested by Petitioner. Taken in connection with the pleadings which charge only negligence of the Director General as a carrier, the evidence of plaintiff which deals only with his negligence as a carrier, and the Court's charge as a whole, this instruction covers the matter sought to be covered by requested instruction No. 24.

At this point it may be well to point out to the Court

some statements appearing in Petitioner's brief *which the record does not justify.*

On pages 22 and 23, Petitioner says:

> "Literally the plaintiff, as something on which he wanted to base his cause of action, stressed negligence on the part of the Government in not distributing cars to the Great Northern, and the objection is now made that, though this can be used in the trial court favorably for a plaintiff as a basis for his cause of action and as a basis for arguing a verdict in his favor, and though the jury may have found a verdict for the plaintiff based solely on the alleged negligent distribution to the Great Northern, nevertheless, the defendant could not urge an error in an instruction given to this effect, or error in a refusal correctly to advise the jury as to the nature of the plaintiff's cause of action, because these contentions, *made by the plaintiff as the basis of his cause of action,* were not pleaded by the defendant as a defense."

Similar assertions appear on page 23 of Petitioner's brief.

We challenge counsel for Petitioner to show from the complaint, the evidence on behalf of Respondent, or the instructions requested by Respondent any basis for such assertions. The matter complained of by Petitioner was injected into the record by counsel for Petitioner himself. The basis of Respondent's cause of action is so apparent that further comment upon such assertions appearing in Petitioner's brief is unnecessary.

(5) As a matter of law.

For yet another reason no error was committed by the Court in the refusal to give Requested Instruction No. 24.

From the evidence submitted by Petitioner upon this phase of the case it is apparent that the Petitioner as a carrier, at the time the contract was made knew, or should have known of the facts relative to car allotments and congestion. These were matters "peculiarly within the knowledge of the defendant, his agents and subordinate officers in charge of that line." In such event the contract must be construed as having been entered into with such facts in mind, and the matter introduced is no defense.

13 C. J. 639;
Paine vs. Parkhurst, 126 C. C. A. 195, 205 Fed. 740;
Transparent Rubber Wks. vs. Glass Co. (N. J.), 105 Atl. 299.

This rule was applied specifically to delay by carrier by the Supreme Court of Montana in the case of

Nelson vs. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642,

and in other jurisdictions.

10 C. J. 292 and cases cited.

Under such circumstances the giving of Petitioner's requested instruction would have constituted error.

It is therefore respectfully submitted that so far as the first ground of error presented herein is concerned the decision of the Supreme Court of Montana should be affirmed.

II.

CONTRACT AS A DISCRIMINATION.

Petitioner's premise on this phase of the case is that it is the duty of the carrier at all times to treat all alike and to furnish cars without an undue preference of one

shipper over another, and that no officer or agent of the railroad could legally give an advantage to one shipper over another may well be admitted as a proper statement of law.

(a) General argument.

Assuming the above premise to be true as a matter of law, it is proper to next ascertain whether such a question arose in the Trial Court, and if so the manner in which it arose.

The question of what constitutes an undue preference or advantage under Section 8565, Comp. Stat. 1916, is a question of fact.

> Texas & P. R. Co. vs. Interstate Comm. Comm., 16 S. Ct. 666, 162 U. S. 197, 40 L. Ed. 940;
>
> Interstate Comm. Comm. vs. Alabama M. R. Co., 18 S. Ct. 45, 168 U. S. 144, 42 L. Ed. 414;
>
> Pennsylvania Co. vs. U. S., 35 S. Ct. 370, 236 U. S. 351, 59 L. Ed. 616.

The invalidity of such contract by reason of its being discriminatory is a matter of defense to be pleaded and proved.

> Engemoen vs. Chicago, St. P., M. & O. R. Co., 210 Fed. 896.

A casual reading of the answer herein discloses that no defense is alleged therein upon the matter of discrimination.

As to the evidence a like failure of proof is apparent. The burden of showing that a contract between a carrier and shipper is preferential and discriminatory is upon the party asserting it.

> N. Y. C. & H. R. Co. vs. General E. Co., 153 N. Y. S. 478.

There was not any evidence whatever offered or introduced by Petitioner showing or tending to show that Respondent was receiving better treatment than other shippers. How, under such circumstances, could the Trial Court in the first instance, the State Supreme Court, and this Court now hold that as a matter of law the contract was discriminatory. If Respondent did not choose to defend upon that ground in the lower court then he may not complain here.

The specifications of error IIA to IIE upon this phase of the case relate to the giving and the refusal to give three certain instructions.

Specification IIA is based upon the refusal of the Trial Court to give Petitioner's requested instruction No. 20 (Tr. p. 70, l. 45, to p. 71, l. 5) as follows:

> "A Station Agent of the Director General has no authority to enter into an express contract to furnish cars on a date named by a shipper irrespective of the general service due the public, and his express agreement, if any, to furnish the cars on that date is not binding if that date is not a reasonable time."

Yet the court gave Petitioner's requested instruction 21 (Tr. p. 71), court's instruction No. 14 (Tr. p. 81), which covers exactly the same matter as is covered by Petitioner's requested instruction No. 20.

Court's instructions numbered 5 (Tr. p. 79) and 11 (Tr. p. 80) also cover substantially the same questions. No error was committed, therefore, in refusing the requested instruction.

> Hunt vs. Van, 61 Mont. 395, 202 Pac. 573;
> McLean vs. Rice, 63 Mont. 556, 208 Pac. 252;
> Mitchell vs. N. P. R. Co., 63 Mont. 500, 208 Pac. 903.

As to Specifications IID and IIE, which relate to

court's instruction No. 4 (Tr. pp. 72 and 79), and Petitioner's objection thereto (Tr. p. 72), the objection discloses that no such question was raised in the Trial Court by such objection as is raised herein. Under such circumstances the Petitioner may not now urge an objection which he did not urge in the Trial Court.

Keokuk Bridge Co. vs. Illinois, 20 S. Ct. 205, 175 U. S. 626, 44 L. Ed. 299;
Dewey vs. Des Moines, 19 S. Ct. 379, 173 U. S. 193, 43 L. Ed. 665.

So far as Specifications IIB and IIC arising over the giving of court's instruction No. 3 (Tr. p. 79) and Petitioner's objection thereto (Tr. p. 72), suffice it to say that it must be considered along with the other instructions given by the Court.

Fitschen vs. Thomas, 9 Mont. 52;
Stephens vs. Elliott, 36 Mont. 92;
Frederick vs. Hale, 42 Mont. 153;
Harrington vs. B. A. & P. R. Co., 36 Mont. 478;

and when so considered is not open to the objection made to it. This is particularly true when it is considered with court's instructions 5 (Tr. p. 79), 11 (Tr. p. 80) and 14 (Tr. p. 81). The same is true as regards the instruction set forth in Specifications IID and IIE.

However, even supposing the question of discrimination to be properly raised, the contract is not objectionable upon the ground urged.

Under private control it could not be controverted that the Great Northern Company's agent at Glasgow

would have authority to make the contract in question and bind the company thereby.

10 C. J. 218;
1 Elliott on Railroads (3rd Ed.), Sec. 345;
Wood vs. Chicago, M. & St. P. Ry Co., 68 Ia. 491, 27 N. W. 473;
Stewart vs. Chicago, R. I. & P. Co., 172 Ia. 313, 151 N. W. 485;
Easton vs. Dudley, 78 Tex. 236, 14 S. W. 583;
Mechem on Agency, Sec. 993;
P. C. C. & St. L. R. Co. vs. Racer (Ind.), 37 N. E. 280;
Clark vs. Ulster & D. R. Co. (N. Y.), 81 N. E. 766;
Texas-Midland R. Co. vs. O'Kelley (Tex.), 203 S. W. 152;
Harrison vs. Mo. Pac. R. Co., 74 Mo. 364;
Nichols vs. O. S. L. R. Co. (Utah), 66 Pac. 768;
McNeer vs. C. & O. R. Co. (W. Va.), 86 S. E. 887;

and the Federal Control Act did not change this rule.

Missouri P. R. Co. vs. Ault, 256 U. S. 554, 41 S. Ct. 593, 65 L. Ed. 1087.

Such a contract is not contrary to public policy, is not violative of the Interstate Commerce Act, and is not discriminatory.

Oregon R. & N. Co. vs. Dumas (C. C. A.), 181 Fed. 781;
C. R. I. & P. R. Co. vs. Beatty (Okla.), 141 Pac. 442;
10 C. J. 213;
Baxley vs. T. & M. R. R. Co., 128 Ala. 183, 29 So. 451;
International G. N. R. Co. vs. Young (Tex.), 28 S. W. 819;
Nichols vs. O. S. L. R. Co., supra.

Outland vs. Sea Board A. L. R. Co. (N. C.), 46 S. E. 735;
Chattanooga S. R. Co. vs. Thompson, 133 Ga. 127, 65 S. E. 285;
Midland V. R. Co. vs. Hoffman Coal Co., 91 Ark. 180, 120 S. W. 380;
Mathis vs. Southern R. Co., 65 S. C. 271, 43 S. E. 684;
Clark vs. Ulster & D. R. R. Co., 189 N. Y. 93, 81 N. E. 766.

This must be especially true where the time expressed in the contract is reasonable and is so found by the jury under proper instructions, as in the present case, and where, as in this case, no complaint is made of the time given.

Baker vs. St. L. R. Co., 145 Mo. App. 189, 129 S. W. 436.

Governmental orders, war necessities, and traffic congestion afford no excuse under the evidence as presented.

Oregon R. & N. Co. vs. Dumas, supra;
Paine vs. Parkhurst, 126 C. C. A. 195, 205 Fed. 740.

The evidence herein shows (Tr. p. 49, fol. 111) that cattle cars were actually available in the Glasgow stock yards of Petitioner on September 23, 1918.

In closing this subdivision of the brief it may be pertinent, in view of Petitioner's arguments, to ask wherein the pleadings or the evidence disclose that Respondent was to receive, under the contract, more than his fair share of the available cars, or cars out of his turn, or that by such contract the railroad was prevented from treating all shippers alike? Nothing in Peti-

tioner's answer raises such questions. None of his witnesses testified that such was the fact.

(b) Authorities cited by Petitioner.

The case of Texas & P. R. Co. vs. Leatherwood, 250 U. S. 478, 39 S. Ct. 517, 63 L. Ed. 1096, does not appear to bear in any way upon the questions presented herein.

The cases of

Pittsburgh, etc., R. Co. vs. Fink, 250 U. S. 577, 40 S. Ct. 27, 63 L. Ed. 1151,

L. & N. R. Co. vs. Maxwell, 237 U. S. 94, 35 S. Ct. 494, 59 L. Ed. 853,

Texas & Pac. Ry. Co. vs. Mugg, 202 U. S. 242, 26 S. Ct. 628, 50 L. Ed. 1011,

are actions to recover the difference between rates charged and the established rates. In each case the question of discrimination was directly raised by pleading and proof and the tariffs appear to have been introduced as proving the discrimination. No such pleading and proof appear in the present action.

In the case of C. R. I. & P. Ry. Co. vs. Beatty, 42 Okla. 528, 141 Pac. 442, the court held that an instruction which said in terms that a special contract could be relied upon to set aside an equal distribution was erroneous. This is undoubtedly correct law, but no similar instruction was offered or given herein. In that case too there is a suggestion that if the contract, though special, is one which is not discriminatory it is valid.

What the answer contained in the case of Underwood vs. Hines, 222 S. W. 1037, is not disclosed. The matter set forth in the opinion, however, appeared "in the case without controversy," and the court held the

demurrer to the evidence should have been sustained. As the Supreme Court of Montana held in the instant case "the facts recited in the opinion distinguish that case from the one now before us." (Tr. p. 89.)

In the case of Saitta & Jones vs. Pennsylvania R. Co., 179 N. Y. S. 471, the evidence disclosed that "the defendant had not filed any tariff with the commission that provided for the contract made." No such evidence appears in the present case.

The leading case of Chicago & A. R. Co. vs. Kirby, 225 U. S. 155, 32 S. Ct. 648, 56 L. Ed. 1033, is much relied upon by Petitioner as being analogous to the instant case. A reading of the decision in that case, however, only serves to give added force to Respondent's position here. In that case the evidence disclosed the following:

> "That the railroad company had established and published through joint rates and charges upon carload shipments of livestock to New York is not disputed. The rates furnished the defendant in error were the regularly published rates. Those rates and schedules did not provide for an expedited service, nor for transportation by any particular train. Neither was Kirby required to pay any other or higher rate for the promised special service, by which his car was to be carried so as to be attached to the fast stock special and carried by it to New York."

Counsel for Petitioner calls our attention to no such evidence appearing in the record here.

Further, the record herein discloses and the jury found that the time given in the contract for the furnishing of cars was a reasonable time taking into consideration the various elements now claimed to show a

discrimination. This finding is not open to question. The contract under such circumstances was one, therefore, which the railroad could make with anyone, for it is bound, contract or no contract, to furnish its equipment to all persons within a reasonable time. The word "reasonable" itself presupposes equal facilities. This is Petitioner's own theory illustrated in his request for instructions (No. 16, Tr. p. 70, No. 20, Tr. p. 71), and the giving, at his request, of Court's instruction No. 14 (Tr. p. 81).

The cases above set forth are the only ones cited by Petitioner as sustaining his position. However, it may be further pointed out that the cases upon which such authorities are based distinguish themselves from the instant case in the same manner as those above particularly noticed.

While it may be true, as counsel suggests, that railroads in modern times are a public liability and a public expense, yet such an hypothesis can hardly change fundamental rules of pleading and practice, or of contract law.

(c) Analogous cases and illustrations of discriminations.

The discussion contained in this portion of Petitioner's brief illustrates as clearly as anything we have said the distinctions between the authorities relied upon by him and the present case. A review of such discussion shows the following elements claimed to disclose a discrimination:

1. No special tariff shown covering special contract.

2. No right to make a special market.

So far as the first of the above elements is concerned, suffice it to say that the burden was upon Petitioner to show a discrimination. This burden he did not care to accept. He produced no proof showing that Respondent did not pay a special tariff, assuming that the contract was special. Nor did he show that the Great Northern had no special tariff covering such contracts. This element is not, therefore, under consideration herein.

A discussion of the second point is equally outside the record.

In giving its reasons for reversing the case of Chicago & A. R. Co. vs. Kirby, supra, the court said:

> "There was no count based upon the carrier's liability for negligence in not promptly shipping and delivering."

Yet that is exactly the basis of the present action. The complaint simply states (Par. XII, Tr. p. 4) that plaintiff was damaged (1) by reason of having to hold his cattle an unreasonable length of time, and (2) by reason of a failure to promptly ship and deliver.

If October 2nd was a reasonable time for the furnishing of cars, then the time of arrival in Chicago becomes a mere matter of mathematical computation. That date of expected arrival is not a special market. It is simply the market to which any shipper is entitled under the obligation of the railroad to promptly ship and deliver. Under instructions given the jury at Petitioner's request the jury found October 2nd to be a reasonable date for the furnishing of cars taking into consideration war necessities, allotment of cars and an extraordinary demand. That finding, made at Peti-

tioner's request, makes his argument on this phase of the case academic.

It should be borne in mind also that a mere apparent preference is not in itself sufficient to render the contract void. The preference must be undue or unreasonable before it becomes under the statute discriminatory.

> Manufacturers Railway Co. vs. U. S., 246 U. S. 457, 38 S. Ct. 383, 62 L. Ed. 831.

So long as the contract forces the railroad to perform nothing unreasonable under the facts and circumstances shown by the evidence it will not be held invalid.

On pages 34 to 36 of Petitioner's brief appears certain matter which it is only necessary to notice briefly. It has no bearing upon the questions properly presented to this Court under the Writ of Certiorari. It relates to conflicts of evidence resolved in Respondent's favor by the verdict of the jury. The kindest thing that may be said of it is that it is set forth in the brief for the apparent purpose of creating prejudice against Respondent.

Under subdivisions (e) and (f) of Petitioner's brief, we find he again falls into the error of assuming that the action is one for damages for failure to reach a certain day's market. This argument is answered by the plain allegations of the complaint. The distinction between the cases is aptly pointed out in the Kirby case, supra.

It may be said in closing that if Petitioner's argument upon this phase of the case is applicable under the pleadings and proof, then no recovery can ever be

had for a failure to promptly ship and deliver. We should always meet the plea that a special market was being insisted upon. This argument is its own answer.

Respectfully submitted,

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Service of the within brief and receipt of..... copies thereof admitted this.....day of....., 1924.

.....
Attorney for Petitioner.